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In the Supreme Court of the United States

October Term, 1958

DANIEL M. COEN and MARION COEN, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF FOR THE RESPONDENT IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statutes involved	2
Statement	2
Argument	6
Conclusion	8
Appendix	9

CITATIONS

Case:	
Helvering v. *Pfeiffer*, 302 U.S. 247	6, 7
Statutes:	
Internal Revenue Code of 1939:	
Sec. 107(b) (26 U.S.C., 1952 ed., 107(b))	4
Internal Revenue Code of 1954:	
Sec. 1311(a) (26 U.S.C. 1311(a))	2, 6, 9
Sec. 1312(3) (26 U.S.C. 1312(3))	2, 9
Sec. 1313(a) (26 U.S.C. 1313(a))	2, 10
Sec. 1314(b) (26 U.S.C. 1314(b))	2, 5, 6, 8, 10
Sec. 7459(a) (26 U.S.C. 7459(a))	2, 7, 10
Sec. 7459(b) (26 U.S.C. 7459(b))	2, 7, 11
Sec. 7459(c) (26 U.S.C. 7459(c))	2, 7, 11
Sec. 7481(1) (26 U.S.C. 7481(1))	2, 11
Sec. 7481(2) (26 U.S.C. 7481(2))	2, 8
Sec. 7482(a) (26 U.S.C. 7482(a))	2, 7, 12
Sec. 7483 (26 U.S.C. 7483)	2, 12

In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 734

DANIEL M. CORY and MARGOT CORY, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (Pet. App. 4-12) are reported at 29 T.C. 903. The opinion of the Court of Appeals (Pet. App. 13-18) is reported at 261 F. 2d 702.

JURISDICTION

The judgment of the Court of Appeals was entered on December 1, 1958. (Pet. App. 19-20.) The petition for a writ of certiorari was filed on February 27, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether, under 26 U.S.C. 1311-1314, the extended time for issuing a deficiency assessment, permitted under certain circumstances after a final decision of the Tax Court, runs from the denial of certiorari by this Court following affirmance by the Court of Appeals on the petitioners' appeal, or from the earlier date when the time for cross appeal by the Commissioner expired.

STATUTES INVOLVED

The pertinent provisions of Sections 1311(a), 1312(3), 1313(a), 1314(b), 7459(a), (b) and (c), 7481(1) and (2), 7482(a) and 7483 of the Internal Revenue Code of 1954 are set forth in the Appendix, *infra*, pp. 9-13.

STATEMENT

The facts are undisputed, and, as found by the Tax Court, may be stated as follows:

Taxpayer Daniel M. Cory received a gift from the author George Santayana in the form of the manuscript of Santayana's autobiography, "Persons and Places". Cory entered into an agreement in November, 1942, with Charles Scribner's Sons for its publication with payment of royalties to Cory. A relative of the author, George Sturgis, disputed Cory's title to the manuscript. An agreement was reached in June, 1943, between Cory, Sturgis and Scribner's, providing for payment of the royalties

into escrow pending settlement of the dispute with payment of not over $12,000 to be made to Cory from the escrow fund. (Pet. App. 5-6.)

During 1944, Scribner's paid $42,363.57 into the escrow fund and $12,000 of this amount was paid to Cory in 1944. The dispute concerning Cory's title was settled in 1945 in his favor and the balance of the fund, $30,257.66 ($105.91 was paid out for escrow fees), was paid over to him in 1945. (Pet. App. 6.)

In their income tax return for 1944, Cory and his wife reported $42,057.66 [1] as net gain from the sale or exchange of a capital asset. However, the return showed that Cory received only $12,000 of this amount in 1944. On the basis of the sum reported the return showed a tax due of $7,699.06. The return also showed $16,429.34 as having been paid on account of such tax, thereby indicating an overpayment of $8,730.28 which was refunded to Cory during or after 1945. (Pet. App. 6-7.)

The taxpayers filed a timely income tax return for 1945 reporting rents or royalties of $4,635.07, less legal expense of $902.33, and showing tax due of $563, tax withheld of $1,390.56, and a refund due of $827.56. (Pet. App. 7.)

In February, 1948, the taxpayers filed a claim for refund of income tax for 1944 in the amount of $7,699.06, the amount originally reported on their return as due. As one ground it was alleged that

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[1] Expenses in amount of $200 were deducted from the total sum paid by Scribner. (Pet. App. 6.)

the gift to Cory may not have been complete during 1944 and the proceeds would be taxable only to Santayana. Alternatively, it was stated that since Cory received only $12,000 in 1944 only this amount should be taxable to the taxpayers in that year. (Pet. App. 7.)

In July, 1951, the Commissioner determined a deficiency for 1944 in the amount of $13,770.50, holding that the amount of $42,057.66 received from Scribner's was taxable as ordinary income. In response to that deficiency determination, the taxpayers filed a petition with the Tax Court, alleging as errors the finding that the taxpayers received $42,057.66 of taxable income from Scribner's in 1944, and the finding that the amount received was taxable as ordinary income and not as capital gain, and the failure to spread the income over 36 months pursuant to Section 107(b) of the Internal Revenue Code of 1939. The petition was later amended, alleging that the gift from Santayana was not complete until 1945 and any proceeds received in 1944 were not the taxpayers' income. (Pet. App. 7-8.)

In resolving that controversy, the Tax Court held (23 T.C. 775) that only $12,000 in proceeds from the publication were received by the taxpayers in 1944 and that such proceeds were taxable as ordinary income and not capital gain.[2] Decision was entered on June 17, 1955. The taxpayers appealed the holding that the proceeds were taxable as ordinary income.

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[2] The Commissioner did not seek review of this holding, and his time to do so expired on October 17, 1955.

The Court of Appeals affirmed on March 9, 1956 (230 F. 2d 941), and certiorari was denied on October 8, 1956 (352 U.S. 828). (Pet. App. 8.)

The instant case arises from the fact that the Commissioner asserted a deficiency against the taxpayers in which he sought to tax as 1945 income the royalties ($30,257.66) received in 1945 which were not reported in that year. The notice of deficiency was issued December 20, 1956, more than 10 years after the 1945 return was filed. Taxpayers pleaded the statute of limitations. (Pet. App. 8.)

The Tax Court found (Pet. App. 9-10) that the position maintained by the taxpayers in the prior case that only $12,000 was received by them in 1944, from which it would necessarily follow that the remainder of the fund was received in 1945, was inconsistent with the position taken in filing their returns, that $42,000 was received in 1944 and none of the royalties in 1945; that this inconsistent position of the taxpayers was adopted in the determination of the Tax Court; that such determination required the exclusion of an item ($30,257.66) included in a return filed by the taxpayers for 1944 which was erroneously omitted from their return for 1945; and that the determination became final upon the denial of the petition for certiorari on October 8, 1956. Accordingly, it held (Pet. App. 10-11) that the deficiency notice mailed on December 20, 1956, was timely, since it was within the one-year period provided in Section 1314(b) of the Internal Revenue Code of 1954 for making the adjustment authorized in Section 1311

(a).[3] The Court of Appeals affirmed the order of the Tax Court. (Pet. App. 19-20.)

ARGUMENT

The decision below is correct. No conflict of decision is involved, and further review is not warranted.

The issue here concerns the timeliness of assessment of a federal income tax deficiency for the year 1945, notice of which was issued on December 20, 1956. Both courts below held the assessment timely under the provisions of Sections 1311-1314 of the Internal Revenue Code of 1954 (Appendix, *infra*, pp. 9-10) which, under stated conditions, allow a period of one year from a final decision of the Tax Court for the assessment of the tax.

The taxpayers do not here question the existence of the conditions, but contend that the decision of the Tax Court became "final" not on October 8, 1956, when this Court denied certiorari, but on October 17, 1955, when the Commissioner failed to cross-petition for review of the Tax Court's holding that only $12,000 was taxable in 1944.

In this regard, taxpayers assert conflict between the decision below and the decision of this Court in *Helvering* v. *Pfeiffer*, 302 U.S. 247. (Pet. 7). This asserted conflict, however, is without substance, for as both courts below pointed out (Pet. App. 11, 17), the *Pfeiffer* case merely stands for the proposition

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[3] The Tax Court also held that the taxpayers' further contention that the amount of gross income to be excluded from 1944 and allocated to 1945 was $9,028.83, rather than $30,363.57, was without merit. (Pet. App. 12.)

that an appellee cannot obtain review of a court ruling unless he files a cross-appeal. Thus, while it follows, under the principle of the *Pfeiffer* case, that the holding of the Tax Court with respect to the liability of the taxpayers for the year 1944 (23 T.C. 775) that they received only $12,000 in that year was not appealable after October 17, 1955, such principle does not require that a Tax Court decision for a single year be broken down into separate holdings for assessment purposes. To do so, as the Second Circuit said (Pet. App. 17), would only add to the confusion and complexity in operating under Sections 1311-1314.

The fallacy of taxpayers' position lies in their failure to distinguish between a report and a decision of the Tax Court, and their failure to realize that appellate review lies only from the decision of the Tax Court. Section 7482(a) of the Internal Revenue Code of 1954 (Appendix, *infra*, p. 12). Under Section 7459(a) of the Internal Revenue Code of 1954 (Appendix, *infra*, pp. 10-11) the Tax Court is required to make a "report" and a "decision" in any proceeding instituted before it. Subsection (b) thereof provides that the "report" shall include its findings of fact or opinion, and subsection (c) provides in pertinent part that the "decision of the Tax Court", except a decision dismissing a proceeding for lack of jurisdiction, shall be rendered upon the date that an "order specifying the amount of the deficiency is entered in the records of the Tax Court".

Thus, the reports correspond to the findings of fact and opinions of district courts while the "decision" is

the "order" which is appealed. Section 7481(2)(B) (Appendix, *infra*, p. 12) provides that where, as in this case, the "decision" of the Tax Court has been affirmed, it shall become "final" upon the denial of a petition for certiorari. Obviously, then, the determination of the Tax Court with respect to taxpayers' 1944 income tax liability became final on October 8, 1956, when this Court denied certiorari, and not on October 17, 1955, when the time within which the Commissioner could file a cross-petition expired. As the court below held (Pet. App. 17), "the real 'determination' required by the statute was not had until judicial opinion was resolved into final adjudication of the monetary assessments involved * * *." Hence the deficiency notice, issued on December 20, 1956, with respect to the item of 1945 gross income, excluded from taxpayer's 1944 return by the Tax Court's determination, constituted a timely method of adjustment under the provisions of Section 1314 (b).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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MARCH, 1959

APPENDIX

Internal Revenue Code of 1954:

SEC. 1311. CORRECTION OF ERROR.

(a) *General Rule.*—If a determination (as defined in section 1313) is described in one or more of the paragraphs of section 1312 and, on the date of the determination, correction of the effect of the error referred to in the applicable paragraph of section 1312 is prevented by the operation of any law or rule of law, other than this part and other than section 7122 (relating to compromises), then the effect of the error shall be corrected by an adjustment made in the amount and in the manner specified in section 1314.

• • • •

(26 U.S.C. 1311.)

SEC. 1312. CIRCUMSTANCES OF ADJUSTMENT.

The circumstances under which the adjustment provided in section 1311 is authorized are as follows:

• • • •

(3) *Double exclusion of an item of gross income.*—

(A) *Items included in income.*—The determination requires the exclusion from gross income of an item included in a return filed by the taxpayer or with respect to which tax was paid and which was erroneously excluded or omitted from the gross income of the taxpayer for another taxable year, or from the gross income of a related taxpayer; or

• • • •

(26 U.S.C. 1312.)

SEC. 1313. DEFINITIONS.

(a) *Determination.*—For purposes of this part, the term "determination" means—

(1) a decision by the Tax Court or a judgment, decree, or other order by any court of competent jurisdiction, which has become final;

* * * * *

(26 U.S.C. Sec. 1313.)

SEC. 1314. AMOUNT AND METHOD OF ADJUSTMENT.

* * * * *

(b) *Method of Adjustment.*—The adjustment authorized in section 1311 (a) shall be made by assessing and collecting, or refunding or crediting, the amount thereof in the same manner as if it were a deficiency determined by the Secretary or his delegate with respect to the taxpayer as to whom the error was made or an overpayment claimed by such taxpayer, as the case may be, for the taxable year or years with respect to which an amount is ascertained under subsection (a), and as if on the date of the determination one year remained before the expiration of the periods of limitation upon assessment or filing claim for refund for such taxable year or years.

* * *

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(26 U.S.C. 1314.)

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SEC. 7459. REPORTS AND DECISIONS.

(a) *Requirement.*—A report upon any proceeding instituted before the Tax Court and a decision thereon shall be made as quickly as practicable. The decision shall be made by a

judge in accordance with the report of the Tax Court, and such decision so made shall, when entered, be the decision of the Tax Court.

(b) *Inclusion of Findings of Fact or Opinions in Report.*—It shall be the duty of the Tax Court and of each division to include in its report upon any proceeding its findings of fact or opinion or memorandum opinion. The Tax Court shall report in writing all its findings of fact, opinions, and memorandum opinions.

(c) *Date of Decision.*—A decision of the Tax Court (except a decision dismissing a proceeding for lack of jurisdiction) shall be held to be rendered upon the date that an order specifying the amount of the deficiency is entered in the records of the Tax Court. If the Tax Court dismisses a proceeding for reasons other than lack of jurisdiction and is unable from the record to determine the amount of the deficiency determined by the Secretary or his delegate, or if the Tax Court dismisses a proceeding for lack of jurisdiction, an order to that effect shall be entered in the records of the Tax Court, and the decision of the Tax Court shall be held to be rendered upon the date of such entry.

* * * * * * * *

(26 U.S.C. 7459.)

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SEC. 7481. DATE WHEN TAX COURT DECISION BECOMES FINAL.

The decision of the Tax Court shall become final—

(1) *Timely petition for review not filed.*—Upon the expiration of the time allowed for

filing a petition for review, if no such petition has been duly filed within such time; or

(2) *Decision affirmed or petition for review dismissed.*—

* * * *

(B) *Petition for certiorari denied.*—Upon the denial of a petition for certiorari, if the decision of the Tax Court has been affirmed or the petition for review dismissed by the United States Court of Appeals; or

* * * *

(26 U.S.C. 7481.)

SEC. 7482. COURTS OF REVIEW.

(a) *Jurisdiction.*—The United States Courts of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court, except as provided in section 1254 of Title 28 of the United States Code, in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury; and the judgment of any such court shall be final except that it shall be subject to review by the Supreme Court of the United States upon certiorari, in the manner provided in section 1254 of Title 28 of the United States Code.

* * * *

(26 U.S.C. 7482.)

SEC. 7483. PETITION FOR REVIEW.

The decision of the Tax Court may be reviewed by a United States Court of Appeals as provided in section 7482 if a petition for such

review is filed by either the Secretary (or his delegate) or the taxpayer within 3 months after the decision is rendered. If, however, a petition for such review is so filed by one party to the proceeding, a petition for review of the decision of the Tax Court may be filed by any other party to the proceeding within 4 months after such decision is rendered.

(26 U.S.C. 7483.)

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